STATE OF MICHIGAN

IN THE SUPREME COURT

AUDREY TROWELL,

Plaintiff/Appellee,

Supreme Court No. 154476

Court of Appeals No: 327525

Oakland County Circuit Court
Lower Court No: 14-141798-NO
HON. COLLEEN A. O'BRIEN

-vs-

PROVIDENCE HOSPITAL AND
MEDICAL CENTERS, INC.,
a Michigan Non-Profit Corporation,

Defendant/Appellant.

/

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DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF TO APPLICATION FOR LEAVE TO APPEAL

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Plaintiff/Appellee Answers "No"
Defendant/Appellant Answers "Yes"
Trial Court Answers "Yes"
Court of Appeals Answers "Undetermined"

II. **WHETHER PLAINTIFF/APPELLEE'S ALLEGATION OF FAILURE TO EXERCISE PROPER CARE TO PREVENT PLAINTIFF/APPELLEE FROM BEING INJURED WHILE IN DEFENDANT/APPELLANT'S HOSPITAL SOUNDS IN MEDICAL MALPRACTICE?**

Plaintiff/Appellee Answers "No"
Defendant/Appellant Answers "Yes"
Trial Court Answers "Yes"
Court of Appeals Answers "Undetermined"

III. **WHETHER PLAINTIFF/APPELLEE'S CLAIMS OF FAILURE TO PROPERLY SUPERVISE THE CARE OF PLAINTIFF/APPELLEE, FAILURE TO PROVIDE ADEQUATE NUMBER OF NURSES TO ASSIST PLAINTIFF/APPELLEE, AND FAILURE TO PROPERLY TRAIN "DANA" AND OTHER NURSES HOW TO PROPERLY HANDLE PATIENTS SUCH AS PLAINTIFF ALL SOUND IN MEDICAL MALPRACTICE?**

Plaintiff/Appellee Answers "No"
Defendant/Appellant Answers "Yes"
Trial Court Answers "Yes"
Court of Appeals Answers "Undetermined"

ARGUMENT I

PLAINTIFF/APPELLEE'S ALLEGATION OF FAILURE TO ENSURE THE SAFETY OF THE PLAINTIFF/APPELLEE IS NEITHER ORDINARY NEGLIGENCE NOR MEDICAL MALPRACTICE

To sound in medical malpractice, the claim must arise "within the course of a professional relationship" and "raise questions of medical judgment beyond the realm of common knowledge and experience." *Bryant v Oakpointe Villa Nursing Ctr, Inc,* 471 Mich 411, 422; 684 NW2d 864 (2004), quoting *Dorris v Detroit Osteopathic Hospital,* 460 Mich 26, 45-46; 594 NW2d 455 (1999). The only element at issue herein is whether the occurrence involved questions of medical judgment beyond the realm of common knowledge and experience.

In order to determine whether questions of medical judgment are raised in a negligence claim, the Court must examine the facts on a case by case basis. *Bryant,* 471 Mich at 421. In the case at bar, Paragraphs 15 and 16 of Plaintiff/Appellee's Complaint identify the allegations of negligence herein. The said paragraphs read as follows:

Count I – Medical Negligence

15. Defendant hospital was negligent in one or more of the following particulars, departing from the standard of care in the community:

a. Failure to ensure the safety of Plaintiff while in Defendant's hospital;

b. Failure to properly supervise the care of Plaintiff while in Defendant's hospital;

c. Failure to provide an adequate number of nurses to assist Plaintiff while in Defendant's hospital;

d. Failure to properly train "Dana" and other nurses in how to properly handle patients such as Plaintiff;

e. Failure to exercise proper care to prevent Plaintiff from being injured while in Defendant's hospital;

16. Defendant hospital was negligent through its agents, employees, and staff in failing to ensure the safety of Plaintiff. (Exhibit B to Application for Leave to Appeal, ¶15-16)

A negligence claim, irrespective of whether it is ordinary negligence or medical malpractice, must establish duty, breach of duty, injury and causation. *Haliw v Sterling Heights,* 464 Mich 297, 309-310; 627 NW2d 581 (2001). There is no duty of care to "ensure" the safety of another in negligence. *Bryant,* 471 Mich at 425-426.

Moreover, pursuant to *Bryant,* "[w]ith reference to medical malpractice law, the Legislature has directed in *MCL 600.2912a et seq*, that negligence is the standard. Thus, strict liability is inapplicable to either ordinary negligence or medical malpractice. As a result, because this claim is unrecognized in this area of our law, this allegation states no claim at all." *Bryant,* 471 Mich at 425-426.

Therefore, according to the *Bryant* holding, paragraphs 15a and 16 fail to state a claim as the allegations in these paragraphs do not sound in ordinary negligence or medical malpractice.

ARGUMENT II

PLAINTIFF/APPELLEE'S ALLEGATION OF FAILURE TO EXERCISE PROPER CARE TO PREVENT PLAINTIFF FROM BEING INJURED WHILE IN DEFENDANT'S HOSPITAL IS A MEDICAL MALPRACTICE CLAIM

A claim of medical malpractice is distinguishable from an ordinary negligence claim as "claims of medical malpractice necessarily 'raise questions involving medical judgment.'" *Bryant,* 471 Mich at 422, citing *Dorris,* 460 Mich at 46.

Contrary to Plaintiff/Appellee's assertion, the Court must look at "the words used in the complaint" when deciding a motion for summary disposition pursuant to MCR 2.116(C)(8). Moreover, a plaintiff cannot avoid the two year statute of limitations by attempting to couch her malpractice claims in ordinary negligence terms. *MacDonald v Barbarotto,* 161 Mich App 542, 549; 411 NW2d 747 (1987).

Plaintiff/Appellee alleges "failure to properly supervise ***the care*** of plaintiff," "failure to ***provide an adequate number of nurses,***" failure to properly train "***nurses how to handle patients such as plaintiff***" and failure to exercise proper care while Plaintiff was a patient in the hospital. Thus, "plaintiff in essence declares that defendant failed to discharge [its] professional duties, resulting in damage to plaintiff;" a professional duty which in this case, as set forth hereinbelow, requires expert testimony to define/explain due to the complexity and severity of Plaintiff/Appellee's health status and her admission into the intensive care unit. *MacDonald,* 161 Mich App at 550.

In the case at bar, Plaintiff/Appellee alleges she was admitted to Defendant/Appellant hospital as a patient as a result of suffering an aneurysm that caused her to also suffer a stroke. (Exhibit B to Application for Leave to Appeal, ¶5). Plaintiff/Appellee further alleges that her condition worsened in that the stroke caused

her to go into cardiac arrest, which necessitated her admission into the intensive care unit (ICU); a unit within the hospital that provides "intensive" and specialized care. (Exhibit B to Application for Leave, ¶6). Further, while being treated in the ICU for these potentially life threatening maladies, Plaintiff/Appellee alleges that a nurse (Plaintiff/Appellee believes the nurse's name is Dana) dropped her while assisting her to the lavatory and that this nurse attempted to assist her a second time, but dropped her again. (Exhibit B to Application for Leave, ¶12). Plaintiff/Appellee also alleges that she was told by someone that she needed two nurses to assist her to the lavatory; however, on several occasions Defendant/Appellant only employed one nurse to assist her. (Exhibit B to Application for Leave, ¶9).

Like Plaintiff/Appellee, the plaintiffs in *Dorris* and *Starr v Providence Hospital, 109 Mich App 762; 312 NW2d 152 (1981),* were patients in specialized units within a hospital. In *Dorris,* the plaintiff alleged that she was the victim of an assault and battery while an in-patient on the hospital's psychiatric unit. Specifically, the plaintiff claimed that she was attacked by another patient and alleged that the attack occurred as a result of defendant hospital's failure to provide an adequate number of staff to supervise and monitor the patients in the unit; thus, patients with violent propensities were allowed to roam the hospital and enter other patients' rooms without supervision. *Dorris, 460* Mich at pp. 46-47

The *Dorris* Court held that plaintiff's claim was one of medical malpractice, not ordinary negligence. The Court explained that "the ordinary layman does not know the type of supervision or monitoring that is required for psychiatric patients in a psychiatric

ward." *Id.* at 47. Instead, such a decision "involves questions of professional medical judgment." *Id.*

Similarly, in *Starr*, the plaintiff was a patient in the special care unit at defendant hospital when another patient climbed into bed with her; plaintiff alleged failure to properly supervise patients and failure to use patient restraints. The Court held that plaintiff's claim sounded in medical malpractice as opposed to ordinary negligence, noting that "[w]ithout expert testimony, a jury would be speculating as to the type of care that one should expect in a "special care unit . . . [t]he type of restraints to be employed and the use thereof also involve professional judgment." *Starr v Providence Hospital,* 109 Mich App at 766.

Plaintiff/Appellee herein seems to suggest that if hospital staff is not actively engaging in providing medical treatment at the time of the injury, then the alleged negligence must be ordinary as opposed to malpractice. However, *Dorris* and *Starr* make clear that same is not true. In both cases, the plaintiffs' injuries occurred at the hands of another patient and the allegation was failure to properly monitor or supervise the other patient. Nevertheless, those Courts held that the plaintiffs' claims were malpractice because expert testimony was necessary to determine the type of care, supervision, monitoring, or number of staff required on units within a hospital that provided specialized care – psychiatric ward, special care unit, or as in this case, an intensive care unit – because laymen do not know.

In the case at bar, not only was Plaintiff/Appellee on a unit that provided specialized care, she had serious health issues. Thus, using the analysis employed by the *Dorris and Starr* Courts, a jury would have to speculate regarding the type of care

one should expect in an intensive care unit. A jury would also have to speculate as to "what type of care" was necessary given Plaintiff/Appellee's diagnosis, physical condition at the time, cognitive abilities or limitations, medications and their potential physical and mental impact, and Plaintiff/Appellee's ability to assist with locomotion as a result thereof.

Further, a jury would have to speculate about the manner/method that should be employed to assist those ICU patients capable of traversing to the lavatory. That is, the jury would have to speculate whether a gait belt should be used; whether a walker was necessary; whether a wheelchair was required; whether two nurses were required, and if two nurses were necessary, whether both should hold onto the patient or if one should merely stand by, ready to assist if needed, et cetera, as the potential methods of assistance are extensive and vary from patient to patient, depending upon her condition.

Thus, both the "medical condition of the plaintiff [and] the sophistication required to safely effect the move - - implicate medical judgment." *Bryant,* 471 Mich at 421, citing *Dorris,* 460 Mich at 26. The average layperson cannot possibly possess, in his wheelhouse of knowledge, the ability to understand and appreciate the physical implications, effects, and limitations occasioned by an aneurysm, followed by a stroke, followed by cardiac arrest, or the impact the medications, and the various combinations of said medications, necessary to treat not one, but three, potentially life-threatening conditions might have on Plaintiff/Appellee physically and mentally and how that might impact her balance and ability to stand and walk.

Contrary to Plaintiff/Appellee's assertion, the facts alleged herein are distinguishable from those set forth in *Fogel v Sinai Hosp of Detroit,* 2 Mich App 99; 138 NW2d 503 (1965) *and Gold v Sinai Hosp of Detroit, Inc,* 5 Mich App 368; 146 NW2d 723 (1966). In both *Fogel and Gold,* the plaintiff warned defendant not to engage in the activity because it was unsafe before the defendant so engaged.

In *Fogel,* the plaintiff requested assistance to the lavatory, but warned the defendant's employee that one aide was not capable of safely assisting her. The aide ignored the warning and attempted to assist the plaintiff to the lavatory, the plaintiff slipped, the aide was incapable of holding the plaintiff and the plaintiff fell. Under the facts in that case, where the defendant was forewarned, the Court held that a layperson was capable of determining whether defendant acted negligently as medical judgment was not involved.

Similarly, in *Gold,* the defendant's nurse was tasked with assisting the plaintiff from a seated position onto the examination table; however, prior to said assistance being provided, the plaintiff warned the nurse that she was nauseated and dizzy and would not be able to make it. Despite this warning, the defendant attempted to assist the plaintiff and she fell. The Court held that medical judgment was not involved, as expert testimony was not necessary to determine whether it was negligent to attempt to lift someone despite being warned that such an attempt would not be successful. The Court determined that a layperson is capable of deciding, without expert testimony, whether it was negligent to fail to heed such a warning.

In *Regalski v Cardiology Associates, P C,* 459 Mich 891; 587 NW2d 502 (1998), the Court held that dropping a patient while assisting him from a wheelchair onto an

examination table is malpractice. The only apparent distinguishing factor between *Regalski and Gold* and *Fogel* is the absence of warning. *Gold* and *Fogel* involved dropping a patient while assisting him from a wheelchair onto an examination table, as did *Regalski*; the only difference is that the plaintiff in *Regalski* did not issue a warning that he would not be able to make it. Therefore, the *Regalski* Court held that the technician was required to exercise medical judgment regarding his ability to safely assist the patient, and had to further exercise medical judgment to determine the method/manner of assistance that should be utilized. As in *Regalski,* there was no warning by Plaintiff/Appellee that she did not believe she could make it or that "Dana" would not be able to hold her; thus, "Dana" had to exercise medical judgment relative to her ability to safely assist Plaintiff/Appellee based upon Plaintiff/Appellee's condition. "Dana" also had to exercise medical judgment in determining the method/manner of assistance to utilize.

Moreover, despite Plaintiff/Appellee's assertion in response to the Defendant/Appellant's Application for Leave, and unlike the plaintiff in *Sheridan v West Bloomfield Nursing & Convalescent Ctr, Inc,* unpublished opinion per curiam of the Court of Appeals issued March 6, 2007 (Docket No. 272205), Plaintiff/Appellee **is not** just alleging Defendant/Appellant "failed to keep Plaintiff/Appellee within her grasp, twice." Instead, Plaintiff/Appellee is challenging the method/manner in which the assistance was provided, as well as the decision-making process relative thereto. In short, Plaintiff/Appellee is challenging the implementation of a one-person assist as opposed to a two-person assist (or a gait belt, wheelchair or walker) and the number of trained staff made available to Plaintiff/Appellee on the ICU.

It is anticipated that Plaintiff/Appellee will argue that the alleged second drop was an act of ordinary negligence; however, this is inaccurate under the facts as plead by Plaintiff/Appellee. Plaintiff/Appellee does not allege "Dana" failed to make any adjustments, or that "Dana" failed to assess the situation, or that "Dana" failed to attempt a different method of assistance; Plaintiff/Appellee merely alleges "Dana" "dropped her a second time." Plaintiff/Appellee is attempting to suggest that any method utilized by Dana other than a two-person assist constitutes ordinary negligence, as if a two-person assist was the only safe method. Expert testimony is necessary to provide the jury with the requisite knowledge to decide what methods of assistance would have complied with the standard of care under the circumstances.

ARGUMENT III

PLAINTIFF/APPELLEE'S CLAIMS OF FAILURE TO PROPERLY SUPERVISE THE CARE OF PLAINTIFF, FAILURE TO PROVIDE ADEQUATE NUMBER OF NURSES TO ASSIST PLAINTIFF, AND FAILURE TO PROPERLY TRAIN "DANA" AND OTHER NURSES HOW TO PROPERLY HANDLE PATIENTS SUCH AS PLAINTIFF ALL SOUND IN MEDICAL MALPRACTICE

This Court has held that claims regarding staffing decisions and patient monitoring can sound in medical malpractice; the determinative factor again is whether questions of professional medical management are involved. *Bryant,* 471 Mich at 426, citing *Dorris,* 460 Mich at 47.

As explained in *Bryant,* in order to determine whether Defendant/Appellant was negligent in its training and supervision of Dana and other nurses, as well as whether the number of nurses provided to care for Plaintiff/Appellee was "adequate," a jury would first have to know what level of training is necessary to care for patients in ICU, what level of supervision is necessary in an ICU; which staff members should be monitored and under what circumstances; what care should be supervised and under what circumstances; what level of expertise is required of the supervisors, whether the level of expertise varies depending upon the care being provided; the patient to staff ratio generally required on an ICU unit, and how this ratio is determined. *Id.* at 428-429.

It is axiomatic that the medical professionals making the training and staffing decisions have to consider the general or typical health of the ICU patient population, and specifically as it pertains to Plaintiff/Appellee, the condition of a patient who has suffered an aneurysm, stroke and cardiac arrest, and is receiving or has recently been given various medications for the treatment of these condition, and the varying range

and degree of adverse side effects from the medications; all of which involve professional medical judgment and, therefore, require expert testimony.

Further, Plaintiff/Appellee's allegation that she was told she needed two nurses to assist her does not eliminate the need for expert testimony and does not make this case analogous to *Gold and Fogel.* This allegation is immaterial as the facts as alleged in Plaintiff/Appellee's Complaint do not indicate that the person making this alleged statement had any affiliation with Defendant/Appellant or that said person was qualified to make such a determination. Given that Plaintiff/Appellee failed to allege that the person she claims made this statement was an agent or employee of Defendant/Appellant, it is just as plausible that this phantom person was a friend or family member of Plaintiff/Appellee, or that Plaintiff/Appellee was intentionally vague because she knows this alleged person was not affiliated with Defendant/Appellant.

Even if this Court should conclude that Plaintiff/Appellee's allegation, when considered in the light most favorable to the non-moving party, asserts that someone affiliated with Defendant/Appellant made this alleged statement, expert testimony is still required to advise the jury: (1) whether there should have been a written order requiring a two person assist; (2) if there was no such written order, whether that was a breach of the standard of care; (3) if there was such an order, whether deviation from the order was a violation of the standard of care under the circumstances as presented at the time of Plaintiff/Appellee's alleged fall; or (4) whether Plaintiff/Appellee's condition improved to the point that the order was no longer applicable.

Interestingly, Plaintiff/Appellee claims, for the first time, in her response to the Application for Leave, that "Dana McCorkle was also aware that Plaintiff/Appellee

required two nurses to assist her." (See page 27 of Plaintiff/Appellee's Response) Plaintiff/Appellee did not proffer this allegation in her Complaint nor did she make such an allegation in the Court of Appeals. Therefore, this allegation is not properly before the Court and should not be entertained. Further, this is yet another transparent attempt to couch malpractice claims in ordinary negligence terms.

Thus, contrary to Plaintiff/Appellee's assertion, medical judgment is absolutely necessary to determine the training necessary for staff, the level of supervision required, as well as the number of staff necessary to properly handle patients like her.

Since medical judgment is involved in making training, supervision, and staffing decisions, paragraphs 15b, 15c and 15d of Plaintiff/Appellee's Complaint sound in medical malpractice.

CONCLUSION

Pursuant to *Bryant,* the negligence allegations contained within Plaintiff/Appellee's Complaint are claims of medical malpractice as opposed to claims of ordinary negligence. As declared by the *MacDonald* Court, "[Plaintiff/Appellee's] complaint is transparently based on malpractice, and the two-year malpractice period of limitation is accordingly applicable." *MacDonald,* 161 Mich App at 549. Thus, since Plaintiff/Appellee failed to comply with the medical malpractice notice requirements, her cause of action is time barred.

STATEMENT OF RELIEF SOUGHT

Defendant/Appellant Providence Hospital and Medical Centers, Inc. respectfully requests that this Honorable Court reverse the Court of Appeals and affirm the trial Court.

Respectfully submitted,

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Dated: June 14, 2017

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of Defendant/Appellant's Supplemental Brief to Application for Leave to Appeal was submitted to The Supreme Court and served upon all parties to the above cause to each of the attorneys of record herein by efiling on June 14, 2017, by:

/s/Curtina Martin